

May 10, 2007

Mr. Daniel J. Kramer
8041 Scotts Store Road
Greenwood, DE 19950

Re: **Freedom of Information Act Complaint
Against Sussex County Council**

Dear Mr. Kramer:

On February 26, 2007, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), alleging that the Sussex County Council ("the Council") violated the open meeting requirements of FOIA by: (1) meeting in executive session on February 13, 2007 for a purpose not authorized by law; and (2) reaching a consensus vote during that executive session regarding a proposal to purchase Sports at the Beach (a private baseball and softball facility).

By letter dated March 2, 2007, our Office asked the Council to respond to your complaint in writing by March 12, 2007. Our Office granted the Council's request for a brief extension of time and received the Council's response on March 19, 2007. On March 23, 2007, our Office asked the Council for a copy of the notice, agenda, and minutes of the public session of the Council's February 13, 2007 meeting, which we received on March 26, 2007.

According to the Council, "[o]n January 23, 2007 the Chairman of the Sussex County Sports Foundation, Bobby Horsey, e-mailed a letter to Mr. David Baker, County Administrator, asking the County to consider guaranteeing a \$5.5 million dollar loan to Wilmington Trust Company and make a \$300,000 a year grant to the Sussex County Sports Foundation for a period of 10 years, which would have amounted to another \$3 million dollars." This financial backing would allow the Sports Foundation to buy the Sports at the Beach facility from Softball World, LLC.

The Council provided us with the notice and agenda for its February 6, 2007 meeting which listed for public discussion, "Sports at the Beach Proposal." The Council also provided us with the minutes of the February 6, 2007 meeting. The minutes reflect that:

Mr. Baker announced that the County has received a proposal from the Sussex County Sports Foundation, a non-profit organization, for assistance in purchasing and operating the Sports at the Beach Complex facility. . . . Mr. Baker reported that the current owner, Softball World, LLC would like to sell the property. He advised that the County is reviewing various options and that the Sports Foundation is proposing several options that would involve the County: 1) The County would purchase the facility and lease the property to the Sports Foundation and to operate it on behalf of the County. 2) The Sports Foundation would purchase the property and the County would assist with the financing.

Wendy Baker was present on behalf of the Sussex County Sports Foundation to discuss a land acquisition proposal for the 93-acre parcel of land with improvements and facilities. Ms. Baker stated that the proposal is for the acquisition of a \$10-\$15 million piece of land for a price that has been negotiated over the past eight months between Sports at the Beach and the Sussex County Sports Foundation for \$7.5 million. . . . Ms. Baker stated that the Foundation believes that with the help of several key organizations and with County, State and Federal grants, Sports at the Beach can continue

to operate without interruption and into perpetuity.

There followed a public discussion of the economic impact of Sports at the Beach and its advantages for Delaware baseball and softball teams. According to the minutes of the February 6, 2007 meeting, the Council did not discuss the lease/purchase option further because it needed additional information about the property.

The Council held its next meeting on February 13, 2007. The agenda for that meeting listed for "Executive Session – Land Acquisition." The Council provided for our *in camera* review the minutes of the February 13, 2007 executive session. Those minutes reflect that the Council considered whether to purchase Sports at the Beach and lease it back to the Sports Foundation (as opposed to the Foundation's buying the property itself with financial support from the County). Because the Council had not received a fair market appraisal of the property or a proposed sales agreement, the Council decided it was "not in a position to take any action on the matter." ¹

The Council then returned to public session. According to the minutes of the February 13, 2007 public session, the County Attorney stated that the Council "was not in a position to take any action on the Sports at the Beach Proposal" because: (1) the "proposal has changed from what was first proposed (on February 6th) as a loan by the County to a request that the County consider buying the property"; and (2) "Since it involves the potential use of public funds, the Council feels it should not act until it has a fair market value appraisal in hand." The County Attorney further advised "that,

¹ As a general rule, our Office is careful not to disclose the contents of executive session minutes provide to us for *in camera* view. We do not believe that limited disclosure of the matters discussed at Council's February 13, 2007 executive session would defeat the lawful purpose for the executive session. According to the Council, "[f]ollowing the February 13 meeting, the matter never came up before Council again because a group of initial investors in the sports facility agreed to purchase it from the selling entity, Softball World, LLC."

when all needed information has been received and the council has had an opportunity to fully review it, the matter would be placed on the Agenda for a future meeting."

RELEVANT STATUTES

FOIA authorizes a public body to meet in executive session for "[p]reliminary discussions on site acquisitions for any publicly funded capital improvements." 29 *Del. C.* §10004(b)(2).

FOIA provides that "[e]xecutive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public." *Id.* §10004(c).

LEGAL ANALYSIS

A. February 13, 2007 Executive Session – Purpose

You contend that the Council did not lawfully meet in executive session on February 13, 2007 for "[p]reliminary discussions on site acquisitions for any publicly funded capital improvements." 29 *Del. C.* §10004(b)(2). You contend that the executive session was not a "preliminary" discussion of a site acquisition because the Council had already discussed (at its February 6, 2007 meeting) buying Sports at the Beach and leasing it to the Sports Foundation.

The Council responds that "the primary focus of the February 6, 2007 meeting was based upon the Foundation's request for a combination of a loan and grant that would have allowed [the Foundation] to purchase the sports facility. When the idea of the County buying the facility came up at the February 6 meeting, Council was advised by legal counsel that before a purchase option

could be explored it would be necessary to receive a proposed contract of sale and determine the status of existing liens against the facility. . . . [T]he limited extent to which the purchase idea was discussed on February 6, did not prevent Council from engaging in a preliminary discussion of site acquisition at its February 13, 2007 executive session."

FOIA authorizes – but does not require – a public body to meet in executive session for "[p]reliminary discussions of site acquisitions." We believe this exception for executive session covers any discussions by a public body until the conclusion of a contract of sale in order to protect the public body's competitive position. Even if there was some discussion at the February 6, 2007 meeting about the County's purchasing Sports at the Beach and leasing it to the Sports Foundation, we do not believe that would foreclose the Council from discussing the lease/purchase proposal in private at a later date.

We determine that the Council did not violate the open meeting requirements of FOIA when it met in executive session on February 13, 2007 to discuss the possible purchase of Sports at the Beach. Any prior public discussion of the purchase did not waive the Council's right under FOIA to further discussion of that site acquisition in private.

B. February 13, 2007 Executive Session – Consensus Vote

You allege that the Council violated FOIA during its executive session on February 13, 2007 by agreeing not to take any action on the Sports at the Beach lease/purchase proposal until the Council obtained additional information. You contend that "this constitutes a consensus vote . . . which is not permitted under [FOIA]."

"Our Office has previously determined that 'FOIA does not permit 'straw polling' nor does FOIA 'allow public bodies to reach 'consensus votes' during executive session.'" *Att'y Gen. Op.* 06-IB12 (June 19, 2006) (quoting *Att'y Gen. Op.* 05-IB29 (Oct. 13, 2005) (quoting *Att'y Gen. Op.* 96-IB15 (May 10, 1996). *See also Att'y Gen. Op.* 96-IB32 (Oct. 10, 1996) ("consensus votes in executive session are prohibited").

In *Att'y Gen. Op.* 06-IB12 (June 19, 2006), the City Council met in executive session to discuss the qualifications of two applicants for the Director of Planning and Inspections as authorized by FOIA (29 *Del. C.* §10004(b)(1)). During the executive session, the council voted (6-3) in favor of one of the two applicants. After moving out of executive session, the Council adjourned the meeting without voting in public on the two applicants. Our Office determined that "the City Council violated the open meeting requirements of FOIA . . . by voting in private on the two finalists for Director of Planning and Inspections."

In *Att'y Gen. Op.* 96-IB15, the City Council met in executive session to discuss retaining special legal counsel. "Although no vote was taken, there was a 'general consensus' to retain Mr. Sergovic and that he was substantially retained as special counsel." Our Office determined that the Council violated FOIA by taking "final action in executive session without a formal vote in open public."

In *Att'y Gen. Op.* 05-IB23 (Aug. 15, 2005) our Office determined that the County Council did not violate FOIA by reaching a consensus vote in executive session. "We have reviewed *in camera* the minutes of the Council's executive session on May 24, 2005. They show that the five members of the Council met with the County Administrator and the County Attorney to discuss two site acquisitions as authorized by FOIA. There is no evidence that the Council went beyond

discussion of those matters of public business and voted on them, or reached a consensus vote for future official action."

The minutes of the Council's February 13, 2007 executive session show that the Council discussed purchasing Sports at the Beach but decided not to take any action until the Council had additional information. There is no evidence in the record to suggest that the Council voted or otherwise took any final action on the lease/purchase proposal. The Council did not take a straw vote to accept or reject the proposal, nor did the Council reach any consensus on how to vote on the proposal for future official action. Instead, the Council decided not to take any action at that time until it had additional information regarding the property. Under these circumstances, we do not believe that the Council reached a "consensus vote" on the lease/purchase proposal as our Office has interpreted that term in the past.

We determine that the Council did not violate FOIA by reaching a consensus vote to take final action on the Sports at the Beach lease/purchase proposal during executive session on February 13, 2007.

Mr. Dennis J. Kramer
May 10, 2007
Page 8

CONCLUSION

For the foregoing reasons, we determine that the Council did not violate the open meeting requirements of FOIA. FOIA authorized the Council to meet in executive session on February 13, 2007 to discuss the proposal to purchase the Sports at the Beach facility and lease it to the Sussex County Sports Foundation. During that executive session, the Council did not reach a consensus vote prohibited by FOIA because the Council did not vote or otherwise take any final action with regard to the lease/purchase proposal.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

Mr. Dennis J. Kramer
May 10, 2007
Page 9

cc: The Honorable Joseph R. Biden, III
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